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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HONORABLE ELLIS GREGORY, JR. and THE HONORABLE ANTHONY P. NUGENT, JR.,

Petitioners,

VS.

THE HONORABLE JOHN D. ASHCROFT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether appointed Missouri state court judges are "appointee[s] on the policymaking level" within the meaning of the Age Discrimination in Employment Act ("ADEA"), 28 U.S.C. §§621-34 (1982 & Supp. V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution?

II.

Whether the mandatory retirement at age seventy of Missouri state court judges, pursuant to Article V, Section 26 of the Missouri Constitution, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, given Missouri's selective imposition of mandatory retirement only upon its judges among all of its employees in non-physically demanding jobs?

LIST OF PARTIES

The plaintiffs in the proceeding below, in addition to the petitioners, the Honorable Ellis Gregory, Jr. and the Honorable Anthony P. Nugent, Jr., were the Honorable Douglas W. Greene and the Honorable Flake L. McHaney. Respondent, The Honorable John D. Ashcroft, governor of the State of Missouri, was the only defendant below. The United States Equal Employment Opportunity Commission appeared as *amicus curiae* in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Honorable Ellis Gregory, Jr. and the Honorable Anthony P. Nugent, Jr. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. A, *infra,* A-1 - A-16) is reported at 898 F.2d 598. The opinion of the district court, (Hungate, J.) (App. B, *infra,* A-17 - A-26) is unreported.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 5, 1990. On May 24, 1990 this Court extend-

ed the time for filing a petition for writ of certiorari to and including July 3, 1990.

Petitioner seeks this Court's review pursuant to 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 623(a) provides:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 630(f) provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C. § 631(a) provides: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

Article V, Section 26 of the Missouri Constitution provides:

> (1) All judges other than municipal judges shall retire by the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.
>
> (2) All judges may retire at an earlier age authorized by law and may participate in a retirement plan provided by law.
>
> (3) Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge he shall have the same powers as an active judge.

Article V, Section 25(a) of the Missouri Constitution provides:

Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson county, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy.

STATEMENT OF THE CASE

1. *Introduction.* One of the questions presented by this petition involves the statutory interpretation of the meaning of the term "appointee on the policymaking level," as used in the Age Dicrimination in Employment Act ("ADEA"), 29 U.S.C. § 630(f), which defines the person exempted from the protections of the ADEA. The other question presented is whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes the State of Missouri from differentiating between its judges, among all of its employees in non-physically demanding jobs, by requiring under Article V, § 26 of the Missouri Constitution that non-municipal state court judges retire upon attaining the age of seventy.

The ADEA prohibits employers from discharging any individual because of the individual's age and from classifying its employees in ways that adversely affect an individual's status as an employee because of the individual's age. 29 U.S.C. § 623(a). The ADEA's prohibitions apply to individuals who are at least forty years of age. 29 U.S.C. § 631(a). The State of Missouri is an "employer" under the ADEA. 29 U.S.C. § 630(b).

Article V, Section 26 of the Missouri Constitution requires that all non-municipal judges "shall retire at the age of 70 years." Mo. Const. art. V, § 26. Accordingly, as employees of the State of Missouri who are over the age of forty when they reach the mandatory retirement age set by the Missouri Constitution, appointed state court judges are entitled to the protections of the ADEA unless they fall into the statutory exemptions of section 630(f). Specifically at issue in the first question presented is whether Congress' use of the undefined term "appointee on the policymaking level" in the list of persons excluded from the definition of "employee" in 29 U.S.C. § 630(f) can be construed to encompass appointed state court judges.

The second question presented is whether the State of Missouri's imposition of a mandatory retirement age upon only its judges, among all of its employees in non-physically demanding jobs, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. *Proceedings In The District Court.* Petitioners and two other Missouri state court judges filed suit in the United States District Court for the Eastern District of Missouri to challenge the validity of the provision of the Missouri Constitution that mandates their retirement upon reaching the age of seventy. *See* Mo. Const. art. V, § 26(1) (1945 as amended 1976) (the "Mandatory Retirement Provision"). Petitioners claimed that the Mandatory Retirement Provision violated both the ADEA and the Equal Protection Clause of the Fourteeenth Amendment.

On July 14, 1989 the district court, the Honorable William L. Hungate, Judge, granted the motion to dismiss filed by the respondent herein, the Honorable John D. Ashcroft, governor of the State of Missouri. The district court held that Missouri's appointed state court judges did not fall within section 630(f)'s exemption from the definition of "employee" as persons "elected *to* public office." App. B at A-20 n.3 (emphasis by the court). *See* App. C at A-27 (Missouri constitutional section that provides mechanism for retention of appointed judges in

office). Judge Hungate ruled, however, that appointed state court judges are exempted from ADEA coverage under another portion of section 630(f) as "appointee[s] on the policymaking level." App. B at A-20.

In dismissing petitioners' equal protection claim, the district court ruled that Missouri has a rational basis for its imposition of a mandatory retirement age upon its judges. App. B at A-23. Judge Hungate relied upon a Missouri Supreme Court opinion, *O'Neil v. Baine,* 568 S.W.2d 761 (Mo. 1978) (en banc), as support for his finding that Missouri has a rational basis for the Mandatory Retirement Provision. Among the rational bases found by the district court were that the Mandatory Retirement Provision would insure a vigorous, healthy and vital judiciary, avoid the difficult decision in determining whether judges are incompetent after a certain age, increase the opportunity for younger persons to serve in the judiciary, and assure predictability and ease in administering judges' pension plans. App. B at A-24 - A-25.

3. Proceedings In The Court of Appeals. The Eighth Circuit affirmed the district court's dismissal of petitioner's complaint. App. A at A-3. Petitioners had appealed the dismissal of their ADEA claim on the ground that judges are not "appointee[s] on the policymaking level."[1] In affirming, the Eighth Circuit agreed that appointed judges are exempted from the ADEA's definition of "employee" as "appointee[s] on the policymaking level" within the meaning of section 630(f). In reaching this conclusion Judge Bowman, writing for the panel, stated that judges occasionally resolve unsettled issues and thus "create law," as well as "exercise considerable policymaking respon-

[1] Governor Ashcroft did not cross-appeal the district court's ruling that appointed state court judges are not subject to the "elected to public office" exemption under section 630(f). The governor had argued unsucessfully in the district court that the "elected to public office" exemption was applicable to appointed judges that are subsequently retained in office by a vote of the electorate.

sibility in the supervision of the Missouri court system." App. A at A-6 - A-8.

In affirming the district court's dismissal of petitioners' constitutional claim, the Eighth Circuit agreed that the bases for the Mandatory Retirement Provision, as expressed by the Missouri Supreme Court in *O'Neil v. Baine,* were indeed rational. App. A at A-14 - A-16. Petitioners had argued that the Mandatory Retirement Provision was constitutionally deficient under *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), because the state was relying "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Brief for the Appellants at 16-17 (quoting *Cleburne,* 473 U.S. at 446). Although the Eighth Circuit acknowledged that "[o]ne might disagree with some or all of these rationales," it nevertheless held that the Mandatory Retirement Provision had a rational basis sufficient to withstand constitutional scrutiny. App. A at A-16. Significantly, the Eighth Circuit did not examine the supposedly rational bases for the Mandatory Retirement Provision to see if they were in *fact* rational as applied. App. A at A-14 - A-16.

REASONS FOR GRANTING THE WRIT

In conflict with the decisions of this Court and another court of appeals, as well as the statutory language of the ADEA, the court of appeals in this case incorrectly decided questions of great importance to the administration of justice throughout the state court systems of this nation. By addressing whether any state can impose an arbitrary upper limit on the age of its judges, the questions presented in this case have potentially dramatic effects upon the composition of state courts throughout the nation. Subsumed within the questions presented are conflicting issues of federalism — the ADEA's expressed federal policy against age discrimination by all employers, including the fifty states, as compared with the right of the states to regulate the means and form of their governments, including their judiciaries.

A. The Conflict Among The Circuits Requires Resolution By This Court Of Whether An Appointed State Court Judge Is An "Appointee On The Policymaking Level" Within The Meaning Of The Age Discrimination In Employment Act ("ADEA") And Therefore Exempted From The ADEA's General Prohibition Of Mandatory Retirement And Thus Subject To Mandatory Retirement Under Various Provisions Of State Constitutions.

In conflict with the prohibitions of the ADEA, and based on an erroneous interpretation of that Act's exemptions, the Eighth Circuit upheld the State of Missouri's discrimination against appointed state court judges on the basis of age. This decision is in direct conflict with a recent Second Circuit case, *EEOC v. Vermont,* No. 89-6178 (2d Cir. May 21, 1990).

In pertinent part the statutory provision at issue provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or

> political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f).

In holding that appointed state court judges are exempted from the ADEA's protections as "appointee[s] on the policymaking level" under 29 U.S.C. §630(f), the Eighth Circuit aligned itself with the First Circuit's decision in *EEOC v. Massachusetts,* 858 F.2d 52 (1st Cir. 1988). In reaching this conclusion, both courts agreed that "policymaking" includes conduct that is very similar to that encompased by phrases like "exercise of discretion" and "exercise of judgment" — terms that frequently are used to describe performance by judges. App. A at A-6; *EEOC v. Massachusetts,* 858 F.2d at 55. The Eighth Circuit took the view that judges are policymakers because they "resolve issues previously unsettled and thus . . . create law." App. A at A-6 - A-7. The Eighth Circuit also found that Missouri's appointed judges "exercise considerable policymaking responsibility in the supervision of the Missouri court system." App. A at A-7.

In direct conflict with these holdings, the Second Circuit, Judge Kearse writing for the court, concluded that "the performance of traditional judicial functions is not policymaking." *EEOC v. Vermont,* No. 89-6178, slip op. at 15 (2d Cir. May 21, 1990). Continuing this line of analysis, that court stated:

> The principal business of the courts is the resolution of disputes. In some cases, the courts resolve those disputes merely by applying established legal principles; in others, they must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled. Even in the latter type of case, however, the courts are called upon primarily

to fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy.

Id.

Both the First Circuit in *EEOC v. Massachusetts* and the Eighth Circuit in this case reasoned that Congress must have intended to exempt appointed state court judges from the definition of "employee" in section 630(f) of the ADEA, because it would be "nonsensical" to have appointed judges protected under the ADEA while elected judges were not. App. A at A-11; 858 F.2d at 57. Both courts also approved as nondiscriminatory a state's desire to avoid the difficult task of evaluating the individual performance of its older judges on the merits by imposing a mandatory retirement age. App. A. at A-15; 858 F.2d at 57.

The Second Circuit expressed sharp disagreement with these conclusions. *EEOC v. Vermont,* No. 89-6178 (2d Cir. May 21, 1990). First, the Second Circuit noted that Congress could easily have exempted judges (if it intended to do so) by specifically including them in the statutory exemption from the definition of "employee." *Id.*, slip op. at 18. Second, Judge Kearse narrowly construed the section 630(f) exemption of an "appointee on the policymaking level" from the definition of "employee"; the court instead limited the exemption to elected officials and a narrowly defined group of appointees that worked closely with the appointing authority but which did not include judges. *Id.*, slip op. at 6-18. Third, addressing the Eighth and First Circuits' position that it was "nonsensical" for Congress to differentiate between appointed and elected judges, the Second Circuit quite properly noted that "[a]ny perceived imprudence in this dichotomy is a matter to be addressed to Congress." *Id.*, slip op. at 18.

Highlighting the conflict between the circuits is the Eighth and First Circuit position that it is reasonable for a state to

avoid the "perilous task of evaluating the performance of its older judges." *EEOC v. Massachusetts,* 858 F.2d at 57. *See* App. A at A-15. The Second Circuit quite correctly attacked this position because of its contravention of the purpose of the ADEA: "Congress enacted the ADEA precisely in order to permit older employees to be evaluated on their merits rather than simply on the basis of age." *EEOC v. Vermont,* slip op. at 18. Thus, as the Second Circuit noted, to the extent that Missouri and Massachusetts support their mandatory retirement scheme, as a means of avoiding the evaluation of the abilities of their older judges of sometimes failing competence by substituting an arbitrary determination on the basis of age, those states' policies directly conflict with the policy determination made by Congress in its enactment of the ADEA. *Id.*

By its context the pertinent statutory language of the policymaking exemption, *supra* at 8-9, supports the Second Circuit's construction of "appointee on the policymaking level" — one that limits "policymakers" to persons on an elected official's staff or who work closely with the elected official in the manner of cabinet officials. *EEOC v. Vermont,* slip op. at 14. "[A]ppointee on the policymaking level" is sandwiched between two other exemptions, both of which specifically limit the exemption to persons working closely with the elected official. 29 U.S.C. §630(f). This militates against the Eighth Circuit's construction, because the policymaking exemption should be construed narrowly. *See* Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2179, 2180; *EEOC v. Bd. of Trustees,* 723 F.2d 509, 510 (6th Cir. 1983).[2] Thus, rather than include policymakers anywhere

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[2] The ADEA exemption for "appointee[s] on the policymaking level" is identical to its Title VII counterpart, *cf.* 42 U.S.C. § 2000e(f), and thus relevant portions of Title VII's legislative history and judicial construction apply to their counterparts in the ADEA. *See, e.g., Lorillard v. Pons,* 434 U.S. 575, 584 (1978).

in state or local government as exempted persons, the appropriate construction of the exemption is the Second Circuit's more narrow version.

As the foregoing summary demonstrates, the lower courts are in need of guidance on the proper interpretation of section 630(f) with respect to whether appointed state court judges are "appointee[s] on the policymaking level." The Eighth Circuit's opinion in this case presents a clear, unambiguous holding in conflict with the Second Circuit and Congressional intent as expressed by the statute's plain language and the legislative history. This Court should therefore resolve this conflict by granting certiorari with respect to the first question presented.

B. In Conflict With This Court's Precedents, The Eighth Circuit Wrongly Construed Article V, Section 26 Of The Missouri Constitution, Which Provides For The Mandatory Retirement Of Missouri State Court Judges Who Attain The Age Of Seventy, As Having A Rational Basis And Not Violating The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution.

In affirming the district court's dismissal of petitioners' equal protection claim, the Eighth Circuit relied primarily upon four reasons that purportedly provide a rational basis for Missouri's Mandatory Retirement Provision. App. A at A-15. As legitimate reasons for the Mandatory Retirement Provision, the Eighth Circuit identified Missouri's interest in (1) "maintaining a highly qualified and vigorous state judiciary," allegedly obtained by drawing a line "at an age at which there is often a lessening in mental and physical abilities"; (2) avoiding the difficult determination of whether a judge is physically or mentally qualified; (3) increasing opportunities for younger lawyers; and (4) "ease in establishing and administering judges' pension plans." App. A at A-15.

The Eighth Circuit's reliance upon these bald assertions contravenes the teachings of this Court's rational basis analysis. The classification at issue in this case is age, and this Court has previously held that age is not a suspect class. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). Nevertheless, this Court has included the aged with the disabled, the mentally ill and the infirm, as groups which have "immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Cleburne*, 473 U.S. at 445-46. Accordingly, while heightened scrutiny would be inappropriate, the aged are still entitled to meaningful and considered review under the rational basis standard: "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

The Eighth Circuit concluded that Missouri's Mandatory Retirement Provision for judges who have reached the age of seventy withstands the rational basis test, *i.e.*, the distinction between judges over and under the age of seventy is rationally related to legitimate governmental purposes. App. A at A-16. Measuring the four purposes previously identified as rational bases for the Mandatory Retirement Provision, *supra* at 12, against the standard identified in *Murgia* and *Cleburne*, the Eighth Circuit decision cannot stand.

In *Cleburne* this Court struck down as arbitrary and irrational a zoning classification that singled out the mentally retarded, because the purposes allegedly supporting that classification were equally applicable to other groups that were not subjected to the same limitation. 473 U.S. at 447-48. In *Cleburne* a group home for the mentally retarded was required to obtain a special use permit when other permitted uses such as apartment houses, fraternity houses, dormitories, hospitals and nursing homes were not. *Id.* This Court concluded that the

distinction was not constitutionally permissible because the record did not reveal any rational basis for believing that the group home for the mentally retarded posed any special threat to the city's legitimate interests in a way that other permitted uses like boarding houses and hospitals would not. *Id.* at 448.

Three of the four principal criteria relied upon by the Eighth Circuit as rational bases for Missouri's Mandatory Retirement Provision are equally infirm under *Cleburne*. The tedious, difficult and potentially embarrassing task of determining which judges are not physically and mentally qualified is no more onerous than the task of identifying which of any other state employees in non-physically demanding jobs are not mentally or physically qualified. Likewise, the provision of increased opportunities for the young results equally from the imposition of a mandatory retirement age in all state employment opportunities. Finally, the ease gained in establishing and administering judges' pension plans by having a mandatory retirement age is no greater than would be gained in any other pension plans administered by the State of Missouri. Missouri's state court judges do not threaten, to a greater extent than any other group of state employees, Missouri's interest in (1) avoiding difficult employee evaluations; (2) providing new employment opportunities for the young; and (3) administering state pension plans with ease. Accordingly, under *Cleburne* these three supposedly rational bases for Missouri's Mandatory Retirement Provision are irrational and violate the Equal Protection Clause of the Fourteenth Amendment. 473 U.S. at 448.

The remaining purpose relied upon by the Eighth Circuit as a rational basis for Missouri's Mandatory Retirement Provision is Missouri's interest "in maintaining a highly qualified and vigorous state judiciary" by drawing "a line at an age at which there is often a lessening in mental and physical abilities." App. A at A-15. This objective is nearly identical to the objective of the State of Massachusetts in the *Murgia* case, i.e., the "physical preparedness" of the police. *See Murgia,* 427 U.S. at

314-15. This Court there upheld the rationality of an age fifty mandatory retirement date for state policemen. *Id.* at 314. In that case, however, an extensive factual record was developed in the district court. *Id.* at 310. This Court upheld the mandatory retirement age, but with the qualification that there "is no indication that [the mandatory retirement statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." *Id.* at 315-16.

Like *Murgia,* there is no indication in this case that the age seventy retirement date for Missouri's state court judges has the effect of excluding from service a significant percentage of judges who are unqualified. Unlike *Murgia,* petitioners were not allowed to present their evidence in court — evidence which they assert would show that Missouri's selection of an age seventy retirement date excludes so few "unqualified" judges that it cannot be rationally related to the goal of insuring a vital, vigorous and healthy judiciary. Given this failure of proof, the remaining ground upon which the Eighth Circuit relied in finding a rational basis is wholly arbitrary and capricious.

Thus, the Eighth Circuit's rational basis analysis is fatally flawed and violates the precedents of this Court's equal protection law. It should be reviewed and corrected by this Court.

CONCLUSION

In summary, this case presents the opportunity to establish clear guidelines for the lower courts on the proper interpretation of the term "appointee on the policymaking level" in 29 U.S.C. § 630(f). The Eighth and First Circuit's interpretations of this provision conflict with that of the Second Circuit, as well as the statutory language and legislative history. The Eighth Circuit's overbroad construction of the ADEA's exemptions from the definition of "employee" threatens to vitiate the ADEA's applicability to the states in a manner far beyond what Congress intended.

Furthermore, the Eighth Circuit's affirmation of the dismissal of petitioners' equal protection claim raises significant constitutional implications. If it is allowed to stand, any state may force any employee to retire at any age without (1) any showing that those forced retirements meet any significant state purpose and (2) without any showing of why the retirement age is not equally applicable to the state's other employment classifications.

For the reasons stated in this petition, petitioners respectfully request that this Court grant the petition for writ of certiorari.

DATED this 3rd day of July, 1990.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 89-2360

Honorable Ellis Gregory, Jr.;
Honorable Anthony P. Nugent, Jr.;
Honorable Douglas W. Greene and
Honorable Flake L. McHaney,
Appellants,

v.

Honorable John D. Ashcroft,
Appellee.

Submitted Nov. 17, 1989

Decided March 5, 1990

Reported at 898 F.2d 598

Jim J. Shoemake, St. Louis, Mo., Samuel Marcosson, amicus curiae, Washington, D.C., for appellants.

Michael L. Boicourt, Jefferson City, Mo., for appellee.

Before BOWMAN and BEAM, Circuit Judges, and ROSS, Senior Circuit Judge.

BOWMAN, Circuit Judge.

Four Missouri state court judges challenge the provision of the Missouri Constitution that mandates their retirement at age 70. Mo. Const. art. V, § 26(1) (1945 as amended 1976) ("mandatory retirement provision"). Judges Ellis Gregory, Jr., Anthony P. Nugent, Jr., and Douglas W. Greene, argue that the mandatory retirement provision violates the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982 & Supp.1987). These judges along with Judge

Flake L. McHaney further argue that the mandatory retirement provision violates the equal protection clause of the Fourteenth Amendment.

Judges Gregory, Nugent, and Greene were initially appointed and have been retained as judges pursuant to the Missouri Non-Partisan Court Plan ("Missouri Plan"). Mo. Const. art. V, § 25. Under the Missouri Plan, the Governor (selecting from candidates recommended by merit screening commissions) appoints judges to the state supreme court, to the state intermediate appellate court, and to the state circuit courts within Jackson County (which encompasses Kansas City) and the city of St. Louis. At the end of his appointed term, each judge must place his name on the ballot in the next general election if he wishes to be retained for another term. If a majority of the voters vote in favor of retaining the judge in office, he serves another full term on the bench. At the end of that term, the judge again may place his name on the ballot and be retained for yet another full term; except for the mandatory retirement provision, there is no limit on the number of terms a judge may achieve through this ballot-retention method. The judges selected according to the Missouri Plan argue that they are "employees" entitled to the protection of the ADEA because they are neither "elected to public office" nor "appointee[s] on the policymaking level." *See* 29 U.S.C. § 630(f).[1]

The District Court[2] granted Governor John D. Ashcroft's motion to dismiss after determining that Judges Gregory, Nugent, and Greene were excluded from the ADEA definition

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[1] The parties do not dispute that Judge McHaney, elected to office in a traditional partisan election, does not fall within the coverage of the ADEA. *See* 29 U.S.C. § 630(f) ("term 'employee' shall not include any person elected to public office . . .").

[2] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

of "employee" because they are "appointee[s] on the policymaking level," 29 U.S.C. § 630(f), and that the mandatory retirement provision does not violate the Fourteenth Amendment because there is a rational basis for this provision. The judges appeal. We affirm.

I.

The statutory claim of Judges Gregory, Nugent, and Greene arises out of an asserted conflict between the ADEA, 29 U.S.C. § 621-634, and the provision of the Missouri Constitution that requires judges to retire upon reaching the age of 70. Subject to several exceptions discussed below, the ADEA prohibits an employer from discriminating on the basis of age in making virtually any employment decision regarding an employee who is 40 or more years of age. 29 U.S.C. §§ 623, 631. In 1976, when the mandatory retirement provision was added to the Missouri constitution, it was unaffected by the ADEA, which at that time applied only to employees between the ages of 40 and 65. In 1978, Congress raised the age limit of 65 to 70, and in 1986 (effective January 1, 1987), it eliminated the upper age limit and amended the ADEA to cover all employees having reached the age of 40. *See* 29 U.S.C. § 631(a).

It is undisputed that if the definition of "employee" contained in the ADEA extends to Judges Gregory, Nugent, and Greene, the application to them of the mandatory retirement provision would be a violation of the Act. Under the supremacy clause of the United States Constitution, a conflict between a constitutionally valid federal law and state law must be resolved in favor of the federal law. *See* U.S. Const. art. VI, cl. 2. Thus, "to the extent that the [ADEA] conflict[s] with existing state mandatory retirement statutes, the Supremacy Clause dictates that federal law prevail." *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 752 (7th Cir.), *cert. denied*, 464 U.S. 992, 104 S.Ct. 484, 78 L.Ed.2d 680 (1983). For supremacy clause purposes, it makes no difference that here the mandatory retirement provision is found in the state constitution rather than in a

state statute. Because, however, the tenure of state judges is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate, we will examine the ADEA to determine whether Congress explicitly and unequivocally manifested its intent to preempt state law in this area. *See United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). We do not think Congress would have passed legislation that so significantly intrudes on a state's power to regulate its judiciary without giving serious consideration to the consequences of the legislation, its implications for our federal system, and the question of its constitutional basis. We therefore will not interpret the ADEA as conflicting with the Missouri Constitution unless we find that Congress clearly has expressed its intention to bring state judges into the ambit of the federal statute. *Accord EEOC v. Massachusetts,* 858 F.2d 52, 54 (1st Cir.1988).

[1] We now turn to the language of the statute. The central issue is whether the "except" clause in the ADEA definition of "employee" applies to appointed state court judges and thereby excludes them from the protection of the Act.

> The term "employee" means an individual employed by any employer *except that* the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policymaking level* or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (emphasis added).

As a preliminary matter, we note that the District Court found Judges Gregory, Nugent, and Greene, initially appointed

by the Governor and retained in office by a majority of the voters as required by the Missouri Plan, to be outside the ADEA's exception for persons "elected to public office". Although we are inclined to disagree with this aspect of the District Court's decision, the Governor did not cross-appeal this issue, it was not briefed by either side, and it is not properly before us. We therefore express no opinion on this point, and shall assume for the balance of this opinion that state judges selected according to the Missouri Plan are appointed and not "elected" within the meaning of the ADEA.[3]

It follows that our task is to determine whether appointed state judges are "appointee[s] on the policymaking level." A handful of federal and state courts have addressed this issue. *See EEOC v. Massachusetts,* 858 F.2d 52 (1st Cir.), *aff'g* 680 F.Supp. 455 (D.Mass.1988); *EEOC v. Illinois,* 721 F.Supp. 156 (N.D.Ill.1989); *EEOC v. Vermont,* 717 F.Supp. 261 (D.Vt.1989); *Schlitz v. Virginia,* 681 F.Supp. 330 (E.D.Va.), *rev'd on other grounds,* 854 F.2d 43 (4th Cir.1988); *In re Stout,* 521 Pa. 571, 559 A.2d 489 (1989); *Apkin v. Treasurer and Receiver Gen.,* 401 Mass. 427, 517 N.E.2d 141 (1988). Of these, only in *Vermont,* 717 F.Supp. at 264, and *Schlitz,* 681 F.Supp. at 334, has it been held that state judges are not "appointee[s] on the policymaking level." The other four cases all reach the opposite conclusion, and thus hold that appointed state judges are not within the purview of the ADEA.

Appellants urge us to adopt the reasoning and holding of the district courts in *Vermont* and *Schlitz.* They argue that a literal reading of the "policymaking level" exception supports their

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[3] Interestingly, the EEOC has taken the position that a state judge "who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.' " EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, *reprinted in* EEOC Compliance Man. (BNA) at N:1001, n. 2.

position because the principal function of a judge is not to make policy, but rather to "decide cases between litigants involving questions of law in which there are no interstices or lacunae to fill." *Vermont,* 717 F.Supp. at 265; Appellant's Brief at 10. We recognize that this view of the role of the judge is not without its adherents. Although it may accurately describe the judge's role in the easy cases, we cannot agree that it does so across the broad spectrum of cases with which judges must deal. The reality of judging is that it is not always—and perhaps not even usually—merely a matter of mechanically applying settled, unambiguous principles of law to specific fact patterns as they arise. We therefore are attracted to the view taken by the First Circuit:

> "[P]olicymaking" is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents.... Moreover, the substantive interest identified by the phrase "on the policymaking level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those persons within the judicial branch who serve as judges. . . .

EEOC v. Massachusetts, 858 F.2d 52, 55 (1st Cir.1988) (*quoting EEOC v. Massachusetts,* 680 F.Supp. at 462 (D.Mass.1988)). In keeping with our common law tradition, judges in deciding the particular cases before them may establish either general standards or specific rules of decision that may be relied upon in the future by other judges, by other branches of government, by attorneys and other professionals in advising their clients, and by members of the public in planning their affairs either individually or in organizations of every kind. Whatever the judicial philosophy of the particular judge, and whether he views his proper role as broad or narrow, his decisions—some of them, at least—necessarily will resolve issues previously unsettled and

thus will create law.[4] Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges must exercise the same sort of discretion in decisionmaking, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policymaking level" in the executive and legislative branches.

Futhermore, many of Missouri's appointed judges exercise considerable policymaking responsibility in the supervision of the Missouri court system. The three levels of the Missouri courts are administered by the Chief Justice of the Supreme Court, the Chief Judges of the various divisions of the court of appeals, and the Presiding Judges in the circuit courts, each having general supervisory powers. Mo. Const. art. V, § 4. The Missouri Supreme Court is responsible for adopting the rules governing the professional conduct of the Missouri judiciary and the Missouri Bar. Moreover, the Missouri Supreme Court is responsible for resolving disputes within the judicial hierarchy. *See In re Rules of Circuit Court for Twenty-First Judicial Circuit,* 702 S.W.2d 457 (Mo.1985) (en banc) (after Twenty-First Judicial Circuit split into factions and was unable to adopt court rules, Supreme Court stepped in and suspended constitu-

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[4] The decisions of the Missouri Supreme Court establish common law for the entire state. *See, e.g., Gustafson v. Benda,* 661 S.W.2d 11 (Mo. 1983) (en banc) (Court rejects previously established tort doctrine of last clear chance and adopts system of comparative negligence as contained in Uniform Comparative Fault Act §§ 1-6 (1983)). Moreover, decisions made in the state courts sometimes involve close and difficult questions of law that have far-reaching ethical, moral, and public policy implications. *See, e.g., Cruzan v. Harmon,* 760 S.W.2d 408 (Mo.1988) (en banc) (holding that parents or other legal guardians lack authority to require that food and water be withheld from comatose daughter who has no cognitive brain function but is neither dead nor terminally ill), *cert. granted,* ___ U.S. ___, 109 S.Ct. 3240, 106 L.Ed.2d 587 (1989).

tional provision allowing associate circuit judges to participate in election of presiding judge); *In re Rules of Circuit Court of Twenty-First Judicial Circuit,* 757 S.W.2d 590 (Mo.1988) (en banc) (after significant headway was made in the implementation of administrative court rules in the circuit, privilege of voting for presiding judge was restored to associate circuit judges). The considerable supervisory power exercised by the justices of the Supreme Court, and to a lesser extent by the court of appeals and circuit court judges, further demonstrates that Missouri judges perform important policymaking functions.

Appellants claim that the context of the exception for an "appointee on the policymaking level", placed as it is within a series of exemptions which apply primarily to the executive and legislative branches of government, indicates that it applies exclusively to appointees within these two branches of government and not to appointees within the judiciary. Appellant's Brief at 11-12. We do not agree. If the policymaking level exception is read in this limited manner, none of the four categories of exemptions from the coverage of the ADEA would apply to employees in the judicial branch in those states where judges are appointed. We believe it is highly unlikely that Congress intended this result, and the implausibility of the total exclusion of the appointed members of the state judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, weighs heavily against such a narrow reading of the policymaking level exception. *See EEOC v. Massachusetts,* 680 F.Supp. at 460-61.

Appellants base their argument in part on legislative history of the exemptions set forth in section 630(f) of the ADEA:

> [i]t is the intention of the conferees to exempt elected officials and members of their personal staff, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly.

Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Admin.News 2179-2180. Relying on this snippet of legislative history (which we are not inclined to assign a great deal of weight, since the only reliable guide to legislative intent is the language and structure of the statute itself), appellants argue that the state courts cannot be considered agencies of state or local government. *See* Appellant's Brief at 13. We disagree. It seems to us far more realistic to view the state judiciary as one of the more powerful "agencies" of state government. The term "government" in this country traditionally has implied the tripartite of the executive, legislative, and judicial branches. We are not persuaded that the language quoted above indicates that Congress clearly intended the "appointee on the policymaking level" exemption in Section 630(f) to apply only to individuals in the executive and the legislative branches. In our view, this legislative history proves little. If anything, it suggests that the conferees simply were not thinking about state judges when they adopted the short statement upon which appellants rely.

If we were to read the "appointee on the policymaking level" exemption as appellants urge us to, we would be left with the anomalous result that low-level employees in the executive and legislative branches would be excluded from the ADEA's coverage if they were on the personal staff of an elected official, while the highest ranking officials in the judicial branch—the judges (but only when appointed rather than elected)—were included within the ADEA's umbrella. As another court noted:

> the resulting line between those who are and those who are not "employees" would be not merely a somewhat waver-

> ing line because of the different characteristics and different sets of interests identified by the four different categories in the "except" clause but, more strikingly, a line jumping sharply up or down as to levels of authority and levels of discretionary performance, depending on whether one served in an elective office (in which case even lower tier officers would be excepted, in all three branches of government) or an appointive office (in which case persons serving in discretionary or advisory positions would be covered in the judicial branch and excepted in the other two branches).

EEOC v. Massachusetts, 680 F.Supp. at 462. Thus an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed. We conclude that Congress's designation of "appointee[s] on the policymaking level" as an exemption to the ADEA definition of "employee" manifests an interest in excluding persons entrusted with extensive decisionmaking authority and discretionary power from the protection of the Act. There is no rational basis for deeming this interest to be more compelling in the executive and legislative branches than in the judiciary, and we refuse to embrace such an inconsistent position. *Accord EEOC v. Illinois,* 721 F.Supp. at 159 ("Absent an express Congressional intent to limit the exception to the legislative and executive branch, a rational reading must include high ranking state officials in all three branches.").

In Missouri, where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA as "appointee[s] on the policymaking level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected

judges for purposes of the ADEA.[5] *EEOC v. Massachusetts,* 858 F.2d at 57 ("The distinction between elected and appointed state judges, which the appellant would have us draw, is nonsensical in terms of furthering the balancing intended by Congress."). Significantly, were we to hold that appointed judges are included within the coverage of the ADEA, it would create an incentive for Missouri to abolish the Missouri Plan and return to selecting all its judges through a purely elective process. Appellants' "proposed reading of the statute would introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have state judges appointed." *EEOC v. Massachusetts,* 680 F.Supp. at 461. Absent a clear expression of Congressional intent to cause this result, we decline to read the exemptions to the ADEA in such a manner.

Finally, appellants argue that this Court's decision in *Stillians v. Iowa,* 843 F.2d 276 (8th Cir.1988), requires us to find that appointed state court judges are not "appointee[s] on the policymaking level." In *Stillians,* we articulated three factors relevant to the determination whether an employee was an "appointee on the policymaking level": "(1) whether the [appointee] has discretionary, rather than solely administrative powers, (2) whether the [appointee] serves at the pleasure of the appointing authority, and (3) whether the [appointee] formulates policy." *Id.* at 278-79 (citations omitted). A judge appointed under the Missouri Plan clearly does not serve at the

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[5] The EEOC argues that states which elect their judges have decided to make them policymakers, responsive to the voters, while states with an appointed bench have chosen to "insulate[] [it] from the political process to which those who make governmental policy are subjected." Brief for EEOC as *amicus curiae* at 9. This argument is unconvincing. The powers and responsibilities of appointed and elected judges are identical and it is these powers and responsibilities that determine whether a judge is on the "policymaking level."

pleasure of the governor who appoints him, and appellants contend that this is dispositive of the question whether they are policymakers for the purposes of the ADEA. We must remember, however, that the sole issue in *Stillians* was whether the program director of the Iowa Arts Council was an "appointee on the policymaking level." (We held that he was.) The application of the policymaking level exception to appointed state judges is a question of first impression for this Court. We do not believe that the list of factors in *Stillians* was intended to be exhaustive or necessarily applicable in all respects to every kind of appointed official. In addition, we stated in *Stillians* that the purpose of the policymaking level exception was to give "[s]tate governors ... broad discretion to fill policymaking positions without fear of being sued by disappointed office seekers." *Id.* at 279. This concern is at least as important in the instant case as it was in *Stillians*. The Governor of Missouri must have the freedom to appoint as judges the persons he feels are best qualified without fear of subjecting himself to age discrimination claims. Moreover, the second factor in *Stillians* reasonably can be read as applying to judges appointed under the Missouri Plan. Following the Governor's appointment of a judge, he serves at the pleasure of the people as a majority of the voters must vote in favor of retaining him if he is to serve another term on the bench. Once the judge's initial term of office is at an end, the voters become, in a very real sense, the appointing authority, for it is they who decide whether or not he continues in office, and he thus serves at their pleasure.

For the reasons stated above, we hold that judges appointed under the Missouri Plan are excluded from the coverage of the ADEA because they are "appointee[s] on the policymaking level" within the meaning of 29 U.S.C. § 630(f).

II.

[2] All four of the judges contend that the Missouri mandatory retirement provision for state court judges violates the

equal protection clause of the Fourteenth Amendment.[6] We do not agree and note that we are unable to find even a single case wherein a state mandatory retirement provision has been invalidated under the Fourteenth Amendment.

Appellants concede that because legislation addressed toward persons over the age of 70 is not subject to heightened scrutiny for constitutional infirmity, our review of the Missouri mandatory retirement provision is confined to determining whether it rationally furthers a legitimate state purpose. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312-13, 96 S.Ct. 2562, 2566-67, 49 L.Ed.2d 520 (1976) (per curiam). Appellants argue, however, that after *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the rational-basis test is no longer as highly deferential to the state as it formerly was, and the state should be held to a strict standard of proof when attempting to establish the rational basis for a state law that has been challenged on equal protection grounds. Because the District Court dismissed their claims without an evidentiary hearing, appellants claim that the state has not met its burden and no rational basis for the mandatory retirement provision has been shown.

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[6] Appellants also claim that the mandatory retirement provision violates the due process clause. We take this to be a substantive due process claim. Appellants have not articulated, however, what fundamental right Missouri's mandatory retirement provision denies them and we therefore will not address this issue. If they are claiming a fundamental right to retain their judgeships after age 70, we categorically reject the notion that the Constitution provides any such right. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (per curiam) ("This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental."); *see also San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 35, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973) (holding that the right to an education is not a fundamental right guaranteed by the Constitution).

Appellants' argument that an evidentiary hearing is required on the rational-basis issue is without merit. In *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), a case decided after *Cleburne,* the record before the Supreme Court consisted of the lower court's judgment on the pleadings; no evidence was produced. The Court held that the ordinance at issue violated neither the due process nor equal protection clauses of the Fourteenth Amendment. *Id.* at 13-14, 108 S.Ct. at 858-859.

> As we stated in *Vance v. Bradley,* 440 U.S. 93, 99 [99 S.Ct. 939, 944, 59 L.Ed.2d 171] (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Id. 485 U.S. at 14, 108 S.Ct. at 859. *Pennell* thus makes it clear that the rational-relationship standard remains a highly deferential standard even after *Cleburne.* And in *Cleburne* itself, the Court stated:

> [t]he lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne, 473 U.S. at 441-42, 105 S.Ct. at 3255-56.

Our task, then, is to determine whether the mandatory retirement provision is a rational method by which Missouri may

serve its legitimate goal of maintaining a highly qualified and vigorous state judiciary. The Missouri Supreme Court considered this issue in *O'Neil v. Baine,* 568 S.W.2d 761 (Mo.1978) (en banc), when it upheld a mandatory retirement provision applicable to state magistrate and probate judges against constitutional challenges. The court articulated a number of rational bases for the mandatory retirement provision including (1) the societal interest in a judicial system of the highest caliber which justifies the drawing of a line at an age at which there is often a lessening in mental and physical abilities; (2) the advantages of an objective line "to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not;" (3) the increase in opportunities to enter the judiciary for qualified younger persons with fresh ideas and techniques; (4) the interest in assuring "predictability and ease in establishing and administering judge's pension plans." *Id.* at 766-67. These rationales are consistent with the conclusions of several other courts. *See, e.g., EEOC v. Massachusetts,* 858 F.2d at 57-58 (it avoids the "perilous task of evaluating the performance of ... older judges", "[t]he forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup"); *Mulmed v. Thornburgh,* 621 F.2d 565, 572 (3d Cir.), *cert. denied,* 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980) (a mandatory retirement provision "eliminates the unpleasantness of selectively removing aged ... judges"); *Trafelet v. Thompson,* 594 F.2d 623, 627, 629 (7th Cir.) (it is rational to treat "judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode," "[m]andatory retirement ... reduces delays in the administration of justice caused by death or disabling illness of sitting judges," the risk of which increases as a judge's age increases), *cert. denied,* 444 U.S. 906, 100 S.Ct. 219, 62 L.Ed.2d 142 (1979); *Apkin,* 517 N.E.2d at 146 ("A line drawn at age seventy eliminates the anguish, time, delay, expense, and em-

barrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process. An age limit on the service of judges also tends to assure that important decisions ... will be made by judges who command respect because they share experiences and understandings similar to those of the majority of adult citizens . . . . [Futhermore, it] makes it possible to increase the proportion of minority group members and women in the judiciary, thereby making the judiciary more representative of society''). One might disagree with some or all of these rationales on either empirical or philosophical grounds and yet be unable properly to conclude that a state which thinks otherwise lacks a rational basis for its mandatory retirement rule for judges.

Because we cannot say that Missouri's mandatory retirement provision for state judges lacks a rational basis, we affirm the District Court's determination that the provision does not violate the equal protection clause of the Fourteenth Amendment.

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-0221C(3)

Hon. Ellis Gregory, Jr., et al.,
Plaintiffs,

v.

John D. Ashcroft,
Defendant.

ORDER

(Entered and Made Public July 14, 1989)

"Age is opportunity no less than youth itself, though in another dress. As the evening twilight fades away, the sky is filled with stars invisible by day." — Unknown.

"I still throw as hard as ever. The ball just doesn't go as fast." Lon Warneke, P. Chicago Cubs, circa 1945.

This matter is before the Court on defendant's motion to dismiss. Plaintiffs oppose the motion. The Court heard oral argument on this motion. After oral argument, the Court stayed these proceedings until March 31, 1989, to give the Equal Employment Opportunity Commission ("EEOC") an opportunity to address administrative charges filed by three of the plaintiffs in December 1988. *See* order dated January 31, 1989. The EEOC proceedings have been closed and the stay has now expired. Accordingly, the Court now considers defendant's pending motion.

Pursuant to this Court's federal question jurisdiction and the Declaratory Judgment Act, 28 U.S.C. §§1331 and 2201, plaintiff state court judges seek declaratory relief with respect to a

Missouri constitutional provision that requires all non-municipal Missouri judges to retire at the age of seventy years. Mo. Const. Art. V, §26(1) (1945, as amended 1976) ("All judges other than municipal judges shall retire at the age of seventy years . . . under a retirement plan provided by law.") Plaintiffs urge this state constitutional provision violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (Count I), as well as the due process and equal protection guarantees of the fourteenth amendment to the federal constitution (Count II). Plaintiff Ellis Gregory, Jr., is sixty-two years old and is an associate circuit judge for the Twenty-First Judicial Circuit of Missouri. Plaintiff Anthony P. Nugent, Jr., is sixty-eight years old and is a judge of the Missouri Court of Appeals, Western District. Plaintiff Douglas W. Greene is sixty-nine years old and is a judge of the Missouri Court of Appeals, Southern District. Plaintiff Flake L. McHaney is sixty-eight years old and is a judge of the Twenty-Fifth Judicial Circuit of Missouri. Defendant John D. Ashcroft is the Governor of the State of Missouri.

The parties do not dispute that plaintiff McHaney is an elected judge, and that plaintiffs Gregory, Nugent, and Greene are subject to the Missouri Non-Partisan Court Plan ("Plan") set forth in Mo. Const. Art. V, §25 (1945, as amended 1976). Pursuant to this Plan, the Governor appoints judges to the state appellate court and to the state circuit courts for St. Louis, Missouri, and Kansas City, Missouri, only. After such appointments, voters periodically determine whether or not each such appointed judge may retain a position on the relevant court.

Defendant moves to dismiss plaintiffs' supplemental complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendant argues (1) age is not a protected class and there is a rational basis for requiring judges to retire at the age of seventy, thus plaintiffs are not deprived of their federal constitutional rights; (2) plaintiffs lack standing to

challenge the state's mandatory retirement provision since plaintiffs are not yet seventy years of age; and (3) plaintiffs[1] are not "employees" covered by the ADEA.[2] The court finds defendant's arguments persuasive and will dismiss the complaint with prejudice at plaintiffs' costs.

In general, the ADEA prohibits an employer from discriminating against an employee who has reached the age of forty. 29 U.S.C. §623 and §631. At present, there is no upper age limit beyond which this prohibition does not apply. The ADEA defines an "employee" in relevant part as:

> an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

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[1] The parties do not dispute that, as an elected judge, plaintiff McHaney does not fall within the ADEA. *See* 29 U.S.C. § 630(f) (under the ADEA, the term " 'employee' shall not include any person elected to public office in any state. . . ."). Nor does plaintiff McHaney pursue the ADEA claim in Count I. Thus, the Court will only address whether plaintiffs Gregory, Nugent, and Greene are "employees" within the meaning of the ADEA.

[2] To the extent defendant also raised the fact plaintiffs had not exhausted their administrative remedies before filing their ADEA claim, that contention is now moot. *See, e.g.*, January 31, 1989, order. Accordingly, the Court will not further address that argument at this time.

29 U.S.C. §630(f). An "employer" includes a state or any political subdivision. 29 U.S.C. §630(b).

The issue now presented to the Court is whether plaintiffs Gregory, Nugent, and Greene may be considered "appointee[s] on the policymaking level" so as to be excluded from ADEA's coverage.[3] Finding persuasive the reasoning of three courts, *Equal Employment Opportunity Commission v. Massachusetts,* 858 F.2d 52 (1st Cir. 1988), *aff'g,* 680 F.Supp. 455 (D. Mass. 1988); *Apkin v. Treasurer and Receiver General,* 517 N.E.2d 141 (Mass. 1988), the answer is yes.

This Court finds that those judges appointed to specified Missouri courts by the Governor pursuant to the Non-Partisan Court Plan, Missouri judges such as plaintiffs Gregory, Nugent, and Greene, are "appointees." Additionally, such judges are "on the policymaking level." As the Hon. Robert E. Keeton stated:

> "policymaking is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents. . . . Moreover, the substantive interest identified by the phrase "on the policymaking level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those persons within the judicial branch who serve as judges. . . .

[3] This Court concurs with plaintiffs that plaintiffs Gregory, Nugent, and Greene, along with similarly situated Missouri state court judges, do not fall within the ADEA's exception for "any person elected *to* public office." 29 U.S.C. §630(f) (emphasis added). Judges selected pursuant to the Non-Partisan Court Plan are appointed to, not elected to, their respective courts. Thus, the Court finds the ADEA's election exception inapplicable here.

E.E.O.C., supra, 680 F.Supp. at 462. In addressing Judge Keeton's quoted language, the First Circuit stated:

> This judicial type of policymaking is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decisionmaking, and the same kind of forward thinking that is required of "appointees on the policymaking level" in those other two branches of government. And it certainly concerns state government to a similar degree.

E.E.O.C., supra, 858 F.2d at 55. The First Circuit further noted

> that Congress did not strictly limit the [ADEA] exception to policymakers, but rather applied it to all those "at the policymaking level." This appears to be a somewhat more flexible standard, which requires us to look at the position of the appointees within the government structure, and not so much at the particular duties of the persons involved.

Id. at 56. On a more practical level, the full Massachusetts Supreme Court remarked that "making a distinction between elected [ADEA expressly inapplicable] and appointed judges [ADEA applicable], would produce a helter-skelter, irrational pattern throughout the country." *Apkin, supra,* 517 N.E.2d at 146.

This determination that a state judge, appointed under the Non-Partisan Court Plan, may be considered an appointee "on the policymaking level" for purposes of the ADEA, does not run afoul of the Eighth Circuit's test for such a position. In *Stillians v. Iowa,* 843 F.2d 276 (8th Cir. 1988), the Eighth Circuit found the following factors relevant to the determination whether a person was an appointee on the policymaking level:

> (1) whether the [appointee] has discretionary, rather than solely administrative powers, . . . (2) whether the [appointee] serves at the pleasure of the appointing authority . . . and (3) whether the [appointee] formulates policy.

Id. at 278-79. Most significantly, that case did not address whether any appointees in the government's judicial branch may be considered to be "on a policymaking level" for purposes of the ADEA's "employee" definition. There is no support for finding that the ADEA's exclusionary language regarding appointees applies only to the non-judicial branches of government. Accordingly, the Court finds the analysis of the First Circuit and of the Massachusetts district court, as set forth in the *E.E.O.C.* opinions, *supra,* determinative of whether an appointed member of the judicial branch falls within the ADEA's exclusionary language.

Nor is the other case on which plaintiffs rely, *Schlitz v. Virginia,* 681 F.Supp. 330 (E.D. Va.), *rev'd on other grounds,* 854 F.2d 43 (4th Cir. 1988), persuasive. The Virginia district court correctly noted the ADEA "neither explicitly includes nor excludes specific types of state judges," but instead distinguishes between "elected and appointed officials," *id.* at 334. The ADEA's employee exception language, however, excludes all officials, whether elected or appointed, who are at "a policymaking level." Thus, it is difficult, if not impossible, to distinguish between elected and appointed state court judges once they are identified, as they have been by this Court, as being "on a policymaking level." Moreover, the fact state court judges "show traditional employee characteristics," *id.* at 333, is not in itself determinative of whether or not the ADEA's exclusions apply. The Act's exclusions cover several positions that "show traditional employee characteristics" which might merit the protection of the ADEA.

Accordingly, after careful consideration, and in light of the reasoning of the First Circuit and Massachusetts courts, the Court will grant defendant's motion to dismiss the ADEA claim in Count I of plaintiffs' supplemental complaint.

The Court further finds the state constitutional provision requiring retirement of state court judges at age seventy does not violate the plaintiffs' federal constitutional rights to due process

and equal protection under the fourteenth amendment. Old age is not a suspect class and there is no fundamental right to government employment *per se. Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (per curiam). Thus, the state's mandatory retirement provision is not reviewed under the strict judicial scrutiny standard. *Id.* Rather, the provision is reviewed to determine whether or not there is a rational basis for the distinction between judges and other state officials or employees to whom no mandatory retirement age applies. *See id.*[4] This test also applies to plaintiffs' due process claim. *Mulmed v. Thornburgh,* 621 F.2d 565, 575-76 (3rd Cir.), *cert. denied,* 449 U.S. 955 (1980).

Under this test, Missouri's mandatory retirement provision for judges withstands plaintiffs' constitutional challenge. The full Missouri Supreme Court upheld a mandatory retirement provision applicable to state magistrate and probate judges

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[4] Plaintiffs urge *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985), "announced an increased, more probing standard of review" for federal equal protection claims in cases such as this. This Court disagrees. In *Cleburne,* the court disapproved of the appellate court's application of a scrutiny stricter than the rational basis standard to a claim that a city ordinance discriminated against the mentally retarded in violation of the equal protection clause. *Id.* at 439-47. In fact, the court stated:

> [t]he lesson of *Murgia* [, *supra,*] is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Id. at 441-42. The fact the Supreme Court in *Cleburne* found that particular ordinance did not withstand the rational basis test does not mean the state constitutional provision in this case similarly violates the equal protection clause.

against constitutional equal protection and due process challenges. *O'Neil v. Baine,* 568 S.W.2d 761 (Mo. 1978) (en banc). In rendering its decision, the state supreme court articulated the bases for such a provision:

> Our citizens are entitled to a judicial system of the highest caliber and to judges with the highest possible mental and physical qualifications. Mandatory judicial retirement is an attempt . . . to insure the fitness of the judiciary as a whole and to insure the continued competency of the system. . . . There are certain ages in life, learned from experience, at which there is a lessening in mental, physical abilities. If mandatory retirement is invalid at age 70, then at what age — 80, 90, or 100? To paraphrase Holmes, — in life, one must make choices. . . . The [provision] draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system. . . . The [provision] is an attempt to insure that, on the whole, only those judges who have the vigor, health and vitality will carry out the public's work in administering justice. The function of mandatory retirement is to permit the withdrawal from the bench that group of judges in which disabilities related to aging are most likely to occur. . . .
>
> Second, the [provision] draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not. A mandatory provision avoids these traumatic and often lengthy hearings.
>
> Third, mandatory retirement increases the opportunity for qualified persons — men and women alike — to share in the judiciary and permits an orderly attrition through retirement. . . .
>
> Such a provision not only achieves the maximum in qualified judicial personnel, but equally important widens the opportunities for qualified younger members of the Bar to seek a judicial post. . . . [A] state might prescribe a mandatory retirement for judges in order to "open up" judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system.
>
> Fourth, such a mandatory provision also assures predictability and ease in establishing and administering judge's pension plans.

Id. at 766-67 (citations and footnote omitted). This articulation is consistent with the conclusions of other courts. *See, e.g., E.E.O.C., supra,* 858 F.2d at 57-58 (it avoids the "perilous task of evaluating the performance of older judges;" "[t]he forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup"); *Malmed, supra,* 621 F.2d at 572 (such a provision "eliminates the unpleasantness of selectively removing aged . . . judges"); *Trafelet v. Thompson,* 594 F.2d 623, 627, 629 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (it is rational to treat "judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode;" "[m]andatory retirement . . . reduces delays in the administration of justice caused by death or disabling illness of sitting judges" which have an increased risk as age increases); *Apkin, supra,* 517 N.E.2d at 146 ("A line drawn at age seventy eliminates the anguish, time, delay, expense, and embarrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process. An age limit on the service of judges also tends to assure that important decisions . . . will be made by judges who command respect because they share experiences and understandings similar to those of the majority of adult citizens. . . . [Furthermore,] it makes it possible to increase the proportion of minority group members and women in the judiciary, thereby making the judiciary more representative of society.").

Accordingly, the Court will grant defendant's motion to dismiss the constitutional claim as set forth in Count II of plaintiffs' supplemental complaint.

After careful consideration,

IT IS HEREBY ORDERED that defendant's motion to dismiss is granted.

IT IS HEREBY FURTHER ORDERED that this action is dismissed with prejudice at plaintiffs' costs.

Dated this 14th day of July, 1989.

/s/ William Hungate
United States District Judge

APPENDIX C

Article V, Section 25(c)(1) of the Missouri Constitution provides:

> Each judge appointed pursuant to the provisions of section 25(a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 25(a)-(g) become applicable to his office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 25(a)-(g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the state if his office is that of judge of the supreme court, or within the geographic jurisdiction limit of the district where he serves if his office is that of a judge of the court of appeals, or within the circuit if his office is that of circuit judge, or within the county if his office is that of associate circuit judge on a separate judicial ballot, without party designation, reading:
>
> "Shall Judge _____
> (Here the name of the judge shall be inserted)
>
> of the _____
> (Here the title of the court shall be inserted)

be retained in office? Yes ____ No ____
(Mark an "X" in the box you prefer.)"

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 25(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.